

### Issue Summary: Meeting with Congressman Nolan, 5/16/2016

- Congressman Richard Michael "Rick" Nolan (D-MN) has represented [ HYPERLINK "https://en.wikipedia.org/wiki/Minnesota%27s\_8th\_congressional\_district" \o "Minnesota's 8th congressional district" ] since 2013. (He also represented [ HYPERLINK "https://en.wikipedia.org/wiki/Minnesota%27s\_6th\_congressional\_district" \o "Minnesota's 6th congressional district" ] from 1975 to 1981; the 32-year gap between terms is the longest in U.S. history.)
- Cong. Nolan's district in northeast Minnesota is historically dependent on the mining industry. As iron mining has decreased, there is increasing interest in copper and nickel mining, and the Region has been involved in reviewing projects.
- Minnesota has about ~~23-22~~ individual permits for hard rock mines. Of these, ~~about~~ 19 are expired (~~many~~ 8 for more than 10 years). The permit for the ~~Pinnac~~ U.S. Steel - Minntac tailings basin has been expired since 1992.
- Most mining permits do not include WQBELs; many also do not reflect current ELGs.
- Tailings basins for taconite operations discharge high levels of sulfates. Although MN has a sulfate WQS for “waters used for production of wild rice,” there is debate over which waters are covered.

### Withdrawal petitions

- Under CWA 402(c)(1) and (2) -
  - Any state permit program under this section shall at all times be in accordance with this section.
  - Administrator may determine that state is not administering program according to CWA; state has time to make corrective actions; program will not be withdrawn until EPA has notified the state in writing for reasons for withdrawal.
  - EPA can also this on its own through the oversight process.
- Under 40 CFR 123.64(b) -
  - EPA may conduct an informal investigation to determine if there is a basis to proceed.
  - If the Administrator determines that withdrawal proceedings should commence, s/he issues an order starting the proceeding, provides a time and place for a hearing, and specifies the allegations against the state to be considered in the hearing.
- EPA has never initiated the formal process to withdraw an NPDES state program.
- Where there are alleged deficiencies, we work with the state and petitioner to gain improvements.
- There have been states that have “considering” voluntary return of the program 40 CFR 123.64(a), but this has not happened in NPDES.
- Currently there are 25 active withdrawal petitions in 18 states.
  - Nationwide, 6 petitions address coal mining and 1 (this) addresses hardrock mining.
  - Region 5 has 7 active petitions; Minnesota has 2 (the other, filed in 2009, dealt primarily with onsite systems and nutrients, and is almost resolved).

*See Region 5's summary, below, for specific information on withdrawal petition.  
Also see attachments for background on issue.*

## **INFORMATION FROM REGION 5:**

On July 2, 2015, EPA received a withdrawal petition from Water Legacy, an environmental advocacy group in Minnesota. The petition alleges deficiencies in Minnesota Pollution Control Agency (MPCA)'s NPDES program regarding discharges from mining operations.

The petition alleges:

- MPCA's implementation of its NPDES permit program has failed to adequately address discharges from mining facilities in several ways:
  - MPCA has not reissued NPDES permits to mines in a timely manner;
  - MPCA has failed to implement narrative WQC in NPDES permits for mines;
  - MPCA has inappropriately used compliance schedules and variances to allow facilities to avoid complying with water quality criteria;
  - MPCA has not provided adequate enforcement of NPDES permits;
  - MPCA has made statements suggesting that tailings basin seepage to surface waters is exempt from NPDES permit requirements.
- Minnesota has enacted legislation prohibiting MPCA from implementing the sulfate criteria for waters used for the production of wild rice.
- Mining interests have undue influence over Minnesota's environmental regulatory authority.

### **Recent Actions:**

- In the summer of 2015 EPA conducted a routine review of state compliance and enforcement programs through a process called "State Review Framework" (SRF). This process traditionally includes file and data reviews. The file review focused on NPDES compliance monitoring and enforcement activities in relation to metallic mining facilities. The information collected during the SRF review may be useful in evaluating the merits of the petition related to enforcement.
- On December 30, 2015 EPA sent a draft protocol outlining how we will investigate the allegations raised in the petition to WaterLegacy and MPCA and requesting comment.
- On March 8, 2016 we provided a finalized version of the protocol to WaterLegacy, with a copy to MPCA. This letter and final protocol was picked up by the news media.
- On April 4, 2016, in response to MPCA's request for 60 days notice in advance of a site visit, EPA sent a letter to MPCA providing notification that EPA intends to conduct its onsite review of MPCA's files during the weeks of July 11 2016 and September 12 2016, as well as a list of permit files we intend to review
- On April 5, 2016 EPA sent a letter to MPCA requesting that, in light of the "Wild Rice Water Quality Standards," it provide an updated Attorney General's statement that explains whether the current scope of MPCA's authority remains adequate to issue permits in compliance with all applicable CWA requirements; including whether MPCA continues to have adequate authority to implement all of its federally approved water quality standards consistent with CWA Section 301(b)(1)(C). MPCA subsequently requested an extension to July 1, 2016 to provide their response and EPA granted this extension on May 9, 2016.
- Region 5 is working with HQ to review the petition. Considering the issues and taking follow-up steps will take several months. Region 5's website for the petition and relevant documents is [ HYPERLINK "<https://www.epa.gov/mn/npdes-petition-program-withdrawal-minnesota>" ].



**ATTACHMENT 1. March 2016 Duluth News article: “Federal agency looking at MPCA permits to taconite companies”**

The U.S. Environmental Protection Agency has laid out its plan to investigate allegations that the Minnesota Pollution Control Agency isn’t doing its job enforcing the federal Clean Water Act on the Iron Range.

In a March 8 letter to PCA officials and the environmental group Water Legacy, the EPA said it will take a hard look at whether state regulators are adequately writing and enforcing water-quality permits issued to industries that pollute into waterways.

Indeed, PCA officials confirmed Tuesday that EPA staff already had been in their offices reviewing the taconite permits.

Minnesota-based Water Legacy asked for the rare review or audit of PCA permits last year, saying there’s ample evidence the state agency has failed to enforce federal Clean Water Act rules while regulating the state’s taconite iron ore mining industry.

If the EPA determines the state isn’t doing a proper job, the federal agency could, under a provision in the Clean Water Act, swoop in and retake all water-permit regulation from the state for all types of industry, not just mining.

Water Legacy claims the PCA has failed to update expired permits for taconite operations, written inadequately weak permits and failed to enforce the permits that are issued. The group claims that several mining permits require companies only to monitor levels of pollutants in their discharge and don’t require any limits on those pollutants as required by federal law.

For example, Minntac in Mountain Iron has been operating its tailings basin under a permit that expired in 1992. Paula Maccabee, attorney for Water Legacy, said a February 2000 letter from MPCA to USX, the predecessor to U.S. Steel, indicated a new permit would include discharge limits for several pollutants, including sulfate. So far, no new permit has been issued.

The latest EPA summary lays out “exactly how they are going to investigate the questions that we’ve raised,” Maccabee said. “They (EPA) haven’t drawn any conclusions yet. ... But they have clearly laid out a very thorough look at what PCA is doing with NPDES (National Pollutant Discharge Elimination System) permits.”

The EPA said it will conduct reviews in the PCA offices in St. Paul and Duluth during federal fiscal year 2016, which ends Sept. 31.

“The EPA has come to review some agency files and has additional files to review,” the PCA said in a statement to the News Tribune on Tuesday. “This review is a long process.”

It’s the second time that environmental groups have asked for such a review. In 2008 the Minnesota Center for Environmental Advocacy petitioned the EPA to take PCA water permitting away, alleging the state was not enforcing phosphorus requirements.

Mike Rafferty, supervisor of communications and outreach for the PCA, said the EPA required his agency to meet certain requirements regarding phosphorus, which overfertilizes lakes and streams. Federal

officials have notified the state agency that they are in compliance with those requirements, although the state has received no formal notice yet, Rafferty said.

Maccabee said not only is the PCA at fault for failing to enforce adequate permits, but that Minnesota lawmakers have a history of stepping in to affect enforcement, such as last year's legislation that prevents the PCA from enforcing limits to sulfate pollutants as they affect wild rice.

"It's not just the PCA looking the other way when it comes to enforcement of mining water quality permits, it's outright legislation that requires PCA to violate the Clean Water Act," Maccabee said.

In the summary of the review to come, EPA officials said they will research all mining-related water permits issued by the PCA. The review also will look at expired permits and whether permits are being requested and awarded on time.

The letter said EPA staff will determine "whether there is a significant backlog of expired NPDES permits (both major and minor) and whether MPCA has the capability — including staff, technical expertise and other resources — to effectively reissue expired permits," the letter notes. "EPA staff will consider the number of expired permits, along with the duration for which the permits have been expired and timeframes for reissuance."

The March 8 letter concludes by saying "EPA will make its finding available for public comment as expeditiously as possible."

**ATTACHMENT 2. 9/14/2014 email from Kevin Pierard**

In our discussions with Minnesota PCA about permit provisions relating to discharges from the Minntac facility in northeast Minnesota we have a substantial issue concerning inclusion of a final effluent limitation and date for its achievement.

As background the Minntac facility contains an active iron ore mine, processing facility, and tailings basin. The final product from the facility is taconite pellets. The facility has three NPDES permits, one for the mine site, one for a sanitary treatment plant (insignificant), and one for the tailings basin. The mine site permit expired in 2011 and is administratively continued. The tailings basin permit expired in 1992 and is also administratively continued.

We have pressured MPCA to “modernize” their mining permits. This includes over 20 expired permits with the Minntac tailings basin permit being the poster child. The state has agreed but progress is slow.

MPCA has decided to public notice the reissuance of the tailings basin permit in late 2014. We are assisting in the drafting of the permit and in working with a very reluctant US Steel company (owners of Minntac). The tailings basin was constructed in the headwaters of two watersheds and covers around four square miles (you can find it on google earth just type in minntac tailings basin). The original tailings permit authorized the discharge from two “surface seeps” to streams and wetlands. The company and PCA have known for decades that a significant discharge from the tailings basin to groundwater and ultimately to surface water is occurring. Distance from the toe of the tailings basin to the first surface stream impact is within 3,000 feet. A back of the envelope estimate suggests the volume of this discharge is at least 5MGD to very small streams and wetlands. (We referred this to enforcement a couple of years ago as a likely unpermitted discharge – they inspected and sent 308 requests and continue to evaluate this but no action yet) The company and PCA were actively working to “cut off” the surface seeps to eliminate the need for an NPDES permit. One seep was cut off by collecting the seep discharge and pumping it back to the tailings basin. Presumably this returned flow ultimately finds its way out of the basin via the groundwater pathway. The work on the second seep is still contemplated but on hold. We notified PCA a few years ago that an NPDES permit will be required for the discharge that is occurring to surface water via the groundwater pathway. US Steel is aware of our position. PCA has accepted our interpretation and is drafting a permit for the tailings basin that will include in stream compliance points (we have agreed on these), WQBELS for each compliance point (we are discussing these with PCA – no agreement yet but I believe we will come to agreement), and a compliance schedule which we do not agree with.

The company has offered no assistance and taken no initiative to evaluate the effluent (PCA had to demand this and EPA had to send them a 308 request) or take steps to mitigate or study mitigation of the discharge which makes the schedule problematic. PCA does not believe they have sufficient information at this time to set a final compliance date in the permit. Although we feel that they could use existing data to make an estimate of the compliance date it would essentially be an educated guess. The schedule they have drafted requires completion of a study of the ground water movement and completion of a study of mitigation technologies. These are set to be completed in about 3 years and at that point PCA feels they could establish a final compliance date and incorporate it into the next permit because we will better understand the scope of the problem and the preferred technology to mitigate the problem. I tend to agree with them and would like to find some middle ground on the schedule language. This is complicated because there is close observation by sophisticated tribes and

enviro groups and the likelihood that this will be appealed and litigated by US steel regardless of what PCA does. We also have the concern that this permit, as in the past, will be administratively continued for a lengthy period which is a strong argument for demanding a final compliance date in this permit. I have told PCA that, in its current form, we would object to this permit due to the inadequacy of the compliance schedule. We have a good working relationship with PCA on this and they understand our concern with the compliance schedule.

We have been discussing ideas on the topic of a compliance schedule and I would like to draw on your experience in our continuing internal brainstorming. Is this something you could commit to in the near term?



**ATTACHMENT 3. 5/14/2015 article from MPR News: "Iron Range legislators, Dayton reach compromise over sulfate standards for wild rice"**

State lawmakers have reached a compromise with Gov. Mark Dayton's administration on legislation over wild rice protection.

The compromise will temporarily prevent state regulators from forcing companies to invest in new treatment technologies to protect wild rice.

At issue is a limit on sulfate — the water quality standard designed to protect wild rice.

Rep. Carly Melin, DFL-Hibbing, and other Iron Range lawmakers fought to prevent the MPCA from enforcing the state's existing sulfate standards, which have only recently been enforced.

Melin said the compromise will allow water permits for operations like U.S. Steel's Minntac plant to go forward without sulfate limits until new rules are ready. It will prevent the MPCA from forcing a mining company or wastewater treatment facility to spend money to reduce sulfate in the water.

"All we're saying is, OK, let's take a breather over these next couple of years here and operate the same way we've operated for the previous 130 years until all the science is in, all the science is complete, all the rules are complete," Melin said.

Once the rules are in place, the compromise allows the MPCA to reopen water permits and enforce the new standard.

Minnesota has a standard for sulfate levels in place — 10 milligrams per liter — but it hasn't been enforced until recently. Meanwhile, the MPCA has proposed a new approach for sulfate rules, which involves looking at the conditions in individual lakes and rivers where wild rice grows.

Sulfate is a compound that occurs naturally, but it's also released by iron mining operations and wastewater treatment plants.

Environmental groups have urged the state to enforce the existing sulfate standard, saying it protects wild rice.

**ATTACHMENT 4. 1/11/2015 Star-Tribune article: “EPA pushes state for tougher limits on Minntac's Iron Range waste pit”**

The U.S. Environmental Protection Agency (EPA) is pressuring the state to take a tougher stance on a massive taconite waste pit that for decades has been leaking pollutants into the nearly pristine watershed that holds Lake Vermilion and the Boundary Waters Canoe Area Wilderness.

In a sharply worded letter last month, the EPA suggested that the state’s proposed plan for the Minntac tailings basin is not in line with the Clean Water Act and other federal laws because it has no clear deadlines to fix the problems.

State pollution officials say that the plan is still a work in progress. But their decision on how the 13-square-mile basin will be managed is under intense scrutiny by industry, Indian tribes and environmental groups because it is emerging in the midst of heated conflicts over the links between taconite mining, the destruction of wild rice and toxic mercury pollution in game fish. And the state’s stance on all mining issues is under the spotlight now because of its pending review of PolyMet Mining Corp.’s proposed copper-nickel mine — a much riskier type of mining that has polarized the state along a jobs vs. environment fault line.

Minntac, owned by Pittsburgh-based U.S. Steel Corp., is the largest taconite operation in the country, employing 1,400 people. It covers nearly 60 square miles near Mountain Iron, including a 10-mile-long open pit mine and several processing facilities. Last year it won state approval to expand its open pit by another 480 acres, extending the life of the mine by 16 years.

Its tailings basin, which holds waste rock and polluted water from decades of mining, is the first and most critical of nearly two dozen mine sites in Minnesota that need new environmental permits from the state. The one for the Minntac tailings basin is the oldest — it expired in 1992.

“We made this one a higher priority because of the level of concern the public has,” said Ann Foss, who heads the mine permit division for the Minnesota Pollution Control Agency (MPCA). “There are impacts in the area that need to be dealt with.”

It was built in the 1960s on top of the Laurentian Divide that separates the St. Louis River Watershed, where water flows to Lake Superior, and the Rainy Lake Watershed where water flows north to the BWCA and Canada. On three sides it is surrounded by forests and wetlands and butts up against the Dark River on the west side and the Sandy River and the twin Sandy Lakes on the east.

But unlike most of the state’s taconite operations that drain into the St. Louis River Watershed, which has long been affected by taconite mining and other industries, this is one of the few sites that drains north into the last remaining areas of the state that is largely untouched.

“It’s a large concern,” said Dan Engstrom, director of the St. Croix Watershed Research Station, an expert on water quality who has studied northeast Minnesota extensively. “You are dealing with a more pristine system.”

Like many tailings basins of that era, it was designed to allow water to filter through the walls and out the bottom. But since its first permit was issued in 1987, environmental science and regulations have advanced considerably. Now the water that seeps through carries contaminants that exceed limits established in a number of pollution laws, including the one that protects wild rice.

### **Sulfates, wild rice and more**

The problem is sulfate, a mineral salt that pours from the Iron Range and its vast mining pits after rock is exposed to air and water. It's also produced by waste water treatment plants and other industrial processes. Wild rice doesn't fare well in waters that are high in sulfate.

Much of the water leaving the pit is polluted with a variety of contaminants, but the sulfate concentrations are among some of the highest measured on the range, said Kathryn Hoffman, an attorney with the Minnesota Center for Environmental Advocacy, a nonprofit law firm. Measurements in the nearby streams and lakes show concentrations that are hundreds of times higher than they should be. The wild rice that once grew in the nearby lakes on the east side is long gone.

"It's a good example of what happens when you leak a lot of sulfate into wild rice waters," said Engstrom.

There may be more at stake than wild rice. Increasingly, research is tying sulfate to mercury. Many of the lakes and rivers in northeastern Minnesota, including those downstream from the Minntac tailings basin, are contaminated with mercury, a neurotoxin that accumulates in the fish that people like to eat.

### **Fighting over quality rule**

Minnesota is the only state in the country with a water quality rule to limit sulfate, adopted years ago to protect wild rice. But since 2010, it's been the subject of court cases, three years of rancorous public debate, \$1.5 million in taxpayer-paid research, and a lengthy scientific review that is expected to be completed early this year.

It's all because the state has been under increasing pressure from the EPA, Indian tribes and environmental groups to enforce it. Industry, on the other hand, has resisted, arguing that the underlying science for the rule is unsound, and has pushed for higher sulfate limits.

Now, that fight has come to roost at the Minntac tailings basin.

"They know the real impact of that sulfate seepage," said Paula Maccabee, an attorney for WaterLegacy, an environmental advocacy group. "Minntac is a poster child for failure to regulate pollution."

Over the years, the company has made changes to reduce the concentrations of pollution in the pit and to collect contaminated water. It's in the process of doing more. But the proposed permit would "have a significant impact on Minntac's operations," and would "cause significant hardship for the company," U.S. Steel said in letter to the MPCA.

The MPCA proposed a plan that would require U.S. Steel to do extensive testing to measure the pollutants in the surrounding creeks and wetlands, and to build more systems that would pump escaping water back into the pit. It gave the company two years to come with a plan to meet water quality standards.

In its written response, the company said much of the demands for testing were "arbitrary and capricious," and that its achieving water quality standards should be designated as goals, not enforceable standards. Moreover, it said, the state has no legal justification for designating the nearby lakes as wild rice waters.

Courtney Boone, spokeswoman for U.S. Steel, said officials would not comment on the proposed permit beyond their written response to the state.

“We are continuing to review it, and are endeavoring to work with stakeholders,” she said.

But the EPA and environmental groups are equally critical of the plan. In its one-page response, the EPA said that, as proposed, the permit does not do enough to address the long-standing pollution problems at the site. It urged the state to develop a plan that “includes extensive and specific actions, and definitive time frames for these actions.”

Hoffman said that what is most disheartening about the proposed permit is that it clearly shows that neither the company nor the state has figured out a solution.

“That’s why there is no end date,” she said.

There’s another looming conflict — which law applies. The state proposes to regulate the groundwater contamination with state law, which Foss said is far more flexible and still has the same outcome — protection of the water. But the EPA insists that the Clean Water Act applies.

“We understand that is their perspective,” she said. “That has been their perspective for a while.”

Foss said that the MPCA will now consider all the comments that have been submitted, and go back to work on the permit. She expects it to be publicly released for comment at the end of January, and that the MPCA’s Citizen’s Advisory Board will consider it later this year.

The permit for the tailings basin will most likely change, she said, but she could not predict how.

“Reasonable people disagree on how to regulate this type of facility,” she said.